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JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 443

SOCIEDAD MARITIMA SAN NICOLAS S.A.,

Petitioner,

vs.

JOHN MONTEILO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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JOHN MONTEIRO,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable The Chief Justice and Associate Justices of the Supreme Court of the United States:

Sociedad Maritima San Nicolas S.A., the petitioner above named, prays that a writ of certiorari issue to review the judgment and decree of the United States Court of Appeals for the Second Circuit entered in the above case on June 29, 1960.

Opinion Below

The opinion of the United States District Court for the Southern District (App. 16-20)* is reported officially at 175 F. Supp. 1 and unofficially at 1959 A. M. C. 2360. The opinion of the Court of Appeals for the Second Circuit (App. 3-15) has not yet been reported.

* Reference in parentheses is to pages of the appendix herein.

Jurisdiction

The judgment and decree of the Court of Appeals for the Second Circuit (App. 1-2) was made and entered on June 29, 1959. The jurisdiction of this Court is invoked under 28 U. S. C. (1254(1)).

Questions Presented

The petitioner is a Panamanian corporation which owns the S. S. "Euryviades", a vessel registered under the laws and flag of the Republic of Liberia. Respondent, a Portuguese seaman, left the vessel at Galveston, Texas. Thereafter he filed a libel against the vessel and the petitioner in the United States District Court for the Southern District of New York, seeking overtime and vacation pay allegedly due him under provisions of the Panamanian Labor Code and penalties under 46 U. S. C. (596 and 597 for each day such overtime and vacation pay remained unpaid. Petitioner excepted to the libel on the ground that the law of the Republic of Liberia and not the Republic of Panama applied. Respondent cross-moved for leave to file an amended libel, so as to more fully set forth the Panamanian law and plead an alternative cause of action under the law of Liberia. The proposed amended libel was substantially the same as the original libel except that another cause of action was pleaded in the alternative, seeking overtime pay allegedly due under a provision of the Liberian Labor Law. In the third cause of action respondent again invoked the penalty provisions of 46 U. S. C. (596 and 597 for each day that the payments due under either the Panamanian Labor Law

or, in the alternative, the Liberian Labor Law, remained unpaid. The Acting Consul General for the Republic of Liberia in New York certified that he would exercise jurisdiction and determine the claim in accordance with the provisions of a treaty between the United States of America and the Republic of Liberia. The District Court sustained the exceptions to the original libel and, in his discretion, denied the cross motion for leave to amend and dismissed the libel without leave to plead over. Upon appeal, the Court of Appeals for the Second Circuit sustained the District Court's dismissal of the original libel and its denial of leave to plead over again the first cause of action in the Panamanian Law but reversed the decree of the District Court with instructions to grant leave to file the amended libel save for the first cause of action.

The questions presented are:

(1) Is the jurisdiction of the Federal Courts mandatory in actions brought by foreign seamen under 46 U. S. C. §596 or 597 against a foreign vessel or shipowner for benefits based on foreign labor statutes?

(2) Are the Federal Courts without any discretionary power to deny leave to amend a foreign seaman's libel or complaint whenever the proposed amended libel or complaint alleges a claim under 46 U. S. C. §596 or 597?

(3) Are the Federal Courts denied, in all cases wherein §596 or 597 are invoked, the power to permit the exercise of jurisdiction by foreign consular authorities over claims brought by foreign seamen under the laws of foreign nations against foreign vessels or shipowners, even though the consular authorities ex-

pressly agree to adjudicate the claim under the provisions of a United States treaty concluded subsequent to the enactment of §§596 and 597a granting to such consular authorities concurrent jurisdiction over wage claims?

(4) Is 46 U. S. C. §§596 or 597 applicable to claims of foreign seamen, which are a) based solely upon a foreign labor statute of general applicability, b) not made at the discharge port or while the vessel is in a harbor of the United States and c) not asserted until several years after the termination of employment?

(5) Is a seaman's claim, derived solely from a foreign labor statute applicable to workmen in general, justiciable in admiralty?

Treaty and Statutes Involved

The treaty and statutory provisions involved are Article X of the Convention Between The United States of America and The Republic of Liberia, 51 Stat. 1751, and 46 U. S. C. §§596 and 597. They are printed in the Appendix infra (App. 21-23).

Statement

The original libel was filed in the United States District Court for the Southern District on October 26, 1956. In the first cause of action the respondent alleged that he served aboard the vessel from April 8, 1952 until he left the vessel in Galveston, Texas on September 22, 1956 and that he was entitled to overtime in the amount of $2,207.15 and vacation pay in

the amount of $323.12 under the Panamanian Labor Code, which was allegedly "assimilated" to his contract of employment. The second cause of action alleged that by virtue of 46 U. S. C. §§ 596 and 597, respondent was entitled to two days' pay for each day such "wages" remained unpaid. When the petitioner herein appeared and excepted to the libel on the ground that the law of Liberia, not Panama, applied to the case, respondent conceded that the exceptions were well taken on the basis of a previous decision of the District Court, and cross-moved for leave to amend the libel so as to more fully plead the Panamanian law as well as an alternative claim under a Liberian statute. The proposed amended libel alleged three causes of action. The first cause of action was identical to the first cause of action in the original libel except for the addition of paragraphs Sixth, Seventh and Eighth which the District Court and the Court below considered immaterial variations. A second cause of action was pleaded in the alternative, seeking $3,510.54, for overtime pay alone, under §51 of the Liberian Labor Law, a provision of general applicability to "workmen". The third cause of action alleged that by virtue of petitioner's failure to pay such "wages", he was entitled under 46 U. S. C. §§ 596 and 597 to "two days' pay for each day that the said wages shall continue to remain unpaid". The Acting Consul General for the Republic of Liberia in New York issued a certificate (R. 31)* stating that he was informed and willing to exercise jurisdiction and hear and determine this wage claim in accordance with the provisions of a Treaty between the United States of

*[illegible] appears on page [illegible] of the certified transcript of record filed in the Court of Appeals.

America and the Republic of Liberia. In opposition to libellant's cross-motion for leave to amend, respondent produced a statement signed by libellant at the time he left the vessel at Galveston stating he had been paid all wages due him (R. 32). Respondent does not deny that he received all his regular monthly wages under his articles of employment.

Reasons for Granting the Writ

1. The decision of the Court below is directly in conflict with the decision of the Third Circuit Court of Appeals in *The Estrella*, 102 F. 2d 736, cert. denied, 306 U. S. 658, 59 S. Ct. 775 (1939). This conflict was conceded in the Court below as follows:

> "The question whether the district court may decline to exercise jurisdiction in such a case has provoked a difference of opinion between courts of appeals. In The Estrella, 102 F. 2d 736 (3d Cir. 1938), cert. denied, 306 U. S. 658 (1939), the Third Circuit held it may. Biggs, C. J., dissenting; in Lakos v. Saliaris, supra, the Fourth Circuit held it may not. We agree with the Fourth Circuit and with the dissenting opinion in the Third."

In *The Estrella* the Third Circuit held that the District Court did not abuse its discretion in refusing to take jurisdiction of a wage claim brought under 46 U. S. C. 597 by alien seamen against a Norwegian vessel on the grounds that Norwegian consular officers could adjudicate the controversy under Article XXII of a Treaty between the Kingdom of Norway and the United States, 47 Stat., Part 2, 2135, 2152 Treaty

Series 852. Article XXII of the Treaty with Norway is identical to Article X of the Convention Between the United States and Liberia Respecting Consular Officers, 54 Stat. 1756 (1939). Judge Biggs dissented from the majority opinion in *The Estrella*, not, as suggested by the Court below, on the ground that jurisdiction was mandatory, but rather on the grounds that the District Court's decision to decline jurisdiction was premature and an improper exercise of its discretion. The rule in *The Estrella* case was in conformity with prior decisions rendered in similar cases, e.g. *The Anahitsis*, 11 F. 2d 235 (D. C. E. D. Pa. 1926), and *The Prince Paul*, 32 F. Supp. 5 (E. D. N. Y., 1940). The contrary view that the District Court did not have any discretion was taken in *Lalos v. Saharis*, 116 F. 2d 440 (4th Cir. 1940), which opinion was followed by the Court below.

The libellants in *The Estrella* case petitioned this Court for a writ of certiorari on the ground that jurisdiction was mandatory. This Court must now resolve these conflicts by deciding whether the District Courts are compelled to take jurisdiction in all cases in which 596 or 597 are invoked under comparable circumstances. It should also resolve the further related issue posed by the decision of the Court below when it denied to the District Court the exercise of any discretion at all in disposing of a motion for leave to amend wherein libellant, almost three years after the filing of his original libel seeking vacation pay and overtime under the Panamanian law and penalties under 596 and 597, sought to amend the libel so as claim either vacation and overtime pay computed under Panamanian law or, alternatively, overtime pay only under the Panamanian law, together with penalties under 596

and 597 of "two days pay for each day that the said wages shall continue to remain unpaid".

2. The Court below in construing 46 U. S. C. §§596 and 597 and determining the applicability of the statutes to foreign seamen, has drawn several erroneous conclusions which are in conflict with prior decisions, including prior decisions of the Court below. The practical effect of the decision is to compel the District Courts to take jurisdiction over a class of cases that could not have been within the contemplation or intendment of the Congress at the time it enacted the penalty provisions of §§596 and 597. For example, it had generally been accepted that the rights of foreign seamen under §§596 and 597 were related to the presence of the foreign vessel in a harbor of the United States. Thus the Second Circuit Court of Appeals in *Transportes Maritimos Do Estado v. Almeida*, 5 F. 2d 151 (2d Cir. 1925), relying on the decision of this court in *Strathcona S. S. Co. v. Dillon*, 252 U. S. 348, reversed a District Court judgment on a foreign seaman's wage claim brought under §596 and remanded the cause with instructions to dismiss the complaint, holding, per Judge Hough at 152-153, as follows:

> "He asserts a right of suit under the cited sections of the Revised Statutes; but those statutes are drawn primarily with reference to vessels of the United States. It is solely by virtue of the proviso (*supra*) that Almeida and his like have any rights, and those rights are extended by the proviso that this section shall apply to seamen on foreign vessels while in harbors of the United States."

"The history of the amendments to the Revised Statutes by what is commonly called the 'La Follette Act' (38 Stat. 1164) is well known, and the legislation was upheld in Strathearn, etc., Co. v. Dillon, 252 U. S. 348, 40 S. Ct. 350, 64 L. Ed. 607, by holding that 'we have no doubt as to the authority of Congress to pass a statute of this sort, applicable to foreign vessels in our ports and controlling the employment and payment of seamen as a condition of the right of such foreign vessels to enter and use the ports of the United States'. In the same decision (page 357), the court speaks of the right of recovering wages under these sections as one given to the seaman while the ship is in a harbor of the United States. To the same effect, The Italia, 257 F. 712, 168 C. C. A. 662.

"This is a wage claim—it can be nothing else for purposes of jurisdiction. As a suit upon a broken Portuguese contract instituted by one alien against another, it has no place on the docket of the District Court. But as a wage claim it belongs to a class of demands which can only be promoted by seamen on foreign vessels while their vessel is in a harbor of the United States."

See also the opinion of the Court below in *The Italia*, 257 F. 712 (2d Cir. 1919). This principle, based upon the construction of the statute and this Court's opinion in *Strathearn S.S. Co. v. Dillon*, 252 U. S. at 356-357 was followed through the years, e.g. in *The Strathfoyle*, 15 F. 2d 210 (D. Oregon, 1926) and *Stavrides v. Am. Parana e Europe Navigation*, 90 F. Supp. 187 (S. D. N. Y., 1950). But a few months after the principle was affirmed by the U. S. District Court for

the Southern District in *Fuller v. Newfoundland-St. Lawrence Shipping Ltd. Proc.*, 24 F. R. D. 9, wherein the Court stated as follows, at page 11:

> ". . . As we read the statute and reported cases discussing jurisdiction it would seem that the court lacks jurisdiction for claims under 596 and 597 unless the ship is in a United States harbor and, perhaps for venue purposes, within the district at the time suit was started, or at least during its pendency . . ."

The decision of the Court below overrules the requirement that the vessel be in a United States port at the time the suit is commenced and authorizes suit in any District Court at any time provided only that the foreign seaman leave his vessel in a United States port.

The Court below also broadened the scope of 596 and 597 to encompass claims that are not founded upon the customary shipping articles or the mariners' contract with the ship or any other agreement related to service about the vessel, but rather founded on foreign statutes similar to our Fair Labor Standards Acts and Wage laws. The legislative history of the statutes in question, particularly when read with 46 U. S. C. 563-578, does not warrant the extension of the penalty provisions to such claims, nor does it warrant a broadening of the word "wages" in such penal statutes to include claims for overtime based solely on such foreign labor statutes.

The Court below also held that a declaration for payment was not required in order to obtain recovery of the penalty for withholding wages and that a

seaman could seek two days' penalty "wages" for each day "overtime" payments under a foreign labor statute were withheld even though such payments were claimed for the first time three years after the seaman left the ship in question. The Court's decision in sustaining, as a matter of law, the sufficiency of the third cause of action in the proposed amended libel for penalties under 46 U.S.C. 596 and 597, is contrary to the principle established in *Cities Service Co.* v. *Peerless*, 281 U.S. 72 and *Wilson* v. *United States*, 291 U.S. 23, and applied in *The Thomas Barlum*, 21 F. 2d 672 (2 Cir. 1927), *Panamanian* v. *Cities Service Co.*, 85 F. Supp. 958 (S.D.N.Y. 1949), *Lipka* v. *Compagnie Belge Maritime du Congo*, 85 F. Supp. 715 (S.D.N.Y. 1949), and 2 Go F. 2d 582 (2 Cir. 1950), and *Vallejo* v. *Flota*, 151 F. Supp. 180 (S.D.N.Y. 1956), that specific action will be only who needlessly withholds payment is arbitrary or willful.

3. In holding that the District Court was mistaken in ruling that a seaman's claim for overtime pay based solely upon a foreign statute applying to workmen generally was not a maritime claim, the Court below merely states without further explanation that the seaman's relationship to the ship was the critical consideration". There was no suggestion as to the material to meet in which a claim based, not on a mariners' contract, but on a foreign overtime statute applying to workmen in general, was related to the sea. The Court in support of its holding referred to *The Panama*, 27 Fed. 118, 123 (S.D.N.Y. 1921) which in a suit by a seaman for personal injuries sustained while on a ship which was not in navigation, but was undergoing repairs in dry dock, held that a charterers' contract of carriage was considered to be a maritime tort and then noted that such wages [illegible] were [illegible] by the Court on

Bourgeois v. Atlantic Maritime Co., 220 F. 2d 152 (2d Cir. 1954) and *Kinkead v. Occidental Company*, 250 F. 2d 582 (2d Cir. 1958). It then reasoned that

> If jurisdiction in admiralty was not there discussed this was doubtless because the rule of La Bourgogne, 210 U. S. 95, 138 (1908), that admiralty will take jurisdiction over tort claims arising from foreign statutes, was thought to make it unnecessary to discuss the similar problem in wage cases.

We do not think the lack of discussion of such issue in the cited cases significant since a claim for personal injuries was joined with the wage claim in the *Kinkead* case and in the *Bourgeois* case, 220 F. 2d at 154, expressly limited its consideration to the applicability of the Panama statute of limitations. Nor is the Court below warranted in concluding that this lacking discussion was doubtless because the rule with respect to maritime tort claims arising from foreign statutes was thought to make it unnecessary to discuss the similar problem in wage cases. On the contrary the Second Court has made it clear that such wage claims are [illegible] This the Second Court in the *Southern Pacific Co. of New York* case, *Navigation Co. v. [illegible]*, 2 F. 2d 2[illegible] F. 2d 2[illegible] Court in a footnote [illegible] the Panama Canal Tolls Case, 13 F. S. 6[illegible] 295 U. S. 602, [illegible] at page 11

involving additional wages due under the Panamanian law, said to be pendent on the other, would seem to be quite floating in thin air. We cannot, therefore, dispossess it on the theory that once having jurisdiction we should resolve the other claims to do substantial justice. The *lis* has disappeared.

"Not being pendent to anything and diversity being absent, the only other possible justification for jurisdiction would be that it is in reality a proceeding in admiralty but incorrectly 'labelled'. But neither at trial nor after has plaintiff suggested this, and his counsel is a most experienced and competent lawyer in this type of litigation. Perhaps the reason is that he is not suing on a maritime contract but rather for penalties under a Panamanian Fair Labor statute and the admiralty would not have jurisdiction."

The District Court's assumption undoubtedly would have stronger conviction in a suit brought under s51 of the Liberian Labor Code which, unlike the Panamanian Fair Labor Statute, does not make any reference to seamen.

The decision of the Court below in extending admiralty jurisdiction to a class of claims similar to that alleged under the Liberian overtime statute is erroneous and in conflict with the frequently quoted principles of admiralty jurisdiction stated by Judge Story in *Peterson v. Bois*, 7 Fed. Cas. 118, 111, No. 3776 (C. C. D. Mass. 1815).

4. Clearly the questions presented are of importance in determining the scope and application of

46 U. S. C. § 596 and 597 and the Treaty rights of foreign consular officers in the administration of the affairs of vessels registered under their laws. Settlement of these questions by this Court is in the public interest and of concern to foreign governments, their consular officers, and perhaps particularly to the United States District Courts, confronted as they are with a mounting volume of cases involving the application of foreign law to disputes between aliens, with attendant problems of foreign tongues, translations and interpretations of foreign law, including recently enacted foreign legislation. *Couto v. Eloita Mercante Del Estado*, 277 F. 2d 664, 667 (2d Cir. 1960). This Court in *Benz v. Compania Naviera Hidalgo*, 353 U. S. 138 referred to the foreign proviso of § 597 and voiced its sensitivity to extensions of the foreign applicability of United States statutes, noting at page 147, per Mr. Justice Clark, as follows:

> "And so here such a 'sweeping provision' as to foreign applicability was not specified in the Act. The seamen agreed in Germany to work on the foreign ships under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed. It alone has the facilities necessary to make fairly such an important policy decision where the possibilities of international discord are so evident and retaliative action so certain. . . ."

This Court recently reiterated again in *Romero* v. *International Terminal Operating Co.*, 358 U. S. 354, 382, 383, its concern about extending United States laws, in the absence of a clear Congressional direction, to "foreign events, foreign ship and foreign seamen" and spoke of the necessity for

> "... due recognition of our self-regarding respect for the relevant interests of foreign nations in the regulation of maritime commerce as part of the legitimate concern of the international community..."

We would note that if jurisdiction is mandatory in these cases the practical effect would be a denial to the foreign consular officers of their authority to determine such disputes, because their decisions would not be binding upon the seamen who would still have access to the Federal Courts if dissatisfied with the determination of the consular officers. Our courts would then be placed in the impossible position of being asked to impugn and invalidate the decisions of consuls of friendly nations, acting, not only under the authority of their government, but under treaties between their governments and the United States of America.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

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Judgment and Decree of the Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-ninth day of June one thousand nine hundred and sixty.

Present:

HON. CHARLES E. CLARK,
HON. LEONARD P. MOORE,
HON. HENRY J. FRIENDLY,
Circuit Judges.

JOHN MONTEIRO,

Libellant-Appellant,

v.

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and the SS EUBYAMABIS, her Engines, etc.,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is reversed with instructions to grant leave to file the amended libel save for the first cause of action, in accordance with the opinion of this court, with costs to the appellant.

A. Daniel Fusaro
Clerk

Opinion of Court of Appeals Reversing District Court Decree

UNITED STATES COURT OF APPEALS

For the Second Circuit

No. 312 October Term, 1950.

Argued May 10, 1950. Decided June 29, 1950.

Docket No. 22558

JOHN MONTERO,

Libelant-Appellant,

v.

SOCIEDAD MARITIMA SAN NICOLAS, S.A. and the SS "EUBYADES," her engines, boilers, tackle, appurtenances, etc.,

Respondents-Appellees.

Before:

CLARK, Moore and Frank,

Circuit Judges.

Libelant appeals from an order of the District Court for the Southern District of New York, Thomas F. Murphy, *Judge*, 175 F. Supp. 1, sustaining respondent's exceptions to the libel, dismissing libelant's cause of action for injury sustained aboard the vessel

Appeal

Opinion of Court on Libelant's Re-
Petition for Leave to

without leave, plead anew. Denial of leave to amend reversed.

Isaac Sutton (Lebowich & Sutton on the brief), New York, N. Y., *for Libelant-Appellant.*

Dennis E. Mooney (Cardillo & Stuth on the brief), New York, N. Y., *for Respondent-Appellee.*

Friendly, *Circuit Judge:*

Libelant is a Portuguese seaman. Respondent, a Panamanian corporation, owns the SS Euryviades, a freighter flying the Liberian flag. Libelant shipped on her at Baltimore in April, 1952 as a fireman; he continued to be employed on the Euryviades until September, 1956. He was then discharged at Galveston and, respondent claims, signed a paper acknowledging that he had "received all money and wages due me from this vessel" and that "my sole reason for leaving the ship is to visit relatives in this country." Monteiro does not deny the receipt of all regular monthly wages. By this libel, brought in October, 1956, in the Southern District of New York, he seeks to recover additional sums claimed to have been due at the time of his discharge. The case was previously before us, 251 F. 2d 511 (2 Cir. 1958), on an appeal from an order quashing the service of process. We held that a hearing was necessary to determine certain issues of fact, and reversed and remanded to that end. Thereafter respondent appeared generally.

Opinion of Court of Appeals Reversing District Court Decree

The libel asserted two causes of action, one for $4,130.11 of vacation and overtime pay alleged to be owing under the Panamanian Labor Code, and the other for $3,024.00 of penalty wages claimed to be due under 46 U. S. C. § 596. Respondent's exceptions challenged the applicability of Panamanian law. Correctly anticipating, on the basis of Judge Ricks' opinion in *Evangelinos* v. *Andriaropoi C.I.A. N.V.*, S.A., 162 F. Supp. 520 (S. D. N. Y. 1958), our decision, *Lauritzen* v. *Larsen Compañia Acandalia, S.A.*, 276 F. 2d 822 (2d Cir. 1960), that Panamanian law was inapplicable under circumstances such as here alleged, libelant cross-moved for leave to amend. The proposed amended libel asserted three causes of action. The first replcaded the claim for vacation and overtime pay under Panamanian law, with variations from the original theme which we deem immaterial. The second set forth a claim for overtime pay of $3,510.54 under § 51 of the Labor Law of Liberia which we quote in the margin.[1] The third cause of action asserted a claim for penalty wages under 46 U. S. C. § 596. The district judge entered an order sustaining the exceptions to the libel, denying the cross-motion for leave to amend and dismissing the libel without leave to plead over, 175 F. Supp. 1. From this order libelant appeals.

[1] "§ 51. Overtime defined; time and one-half required. Except as otherwise provided in this chapter, no employer shall employ any workman for a workweek longer than forty-eight hours unless such workman receives payment for each hour worked in excess of forty-eight at the rate of one and one-half times the hourly rate at which he is employed."

Opinion of Court of Appeals Reversing District Court Below

For reasons stated in *Gomez v. Alianca Companhia Nacional*, *supra*, the district court was right in dismissing the original libel and in denying leave to plead the first cause of action in the proposed amended libel. However, unlike *Gomez*, where libelant had neither pleaded nor proved the Liberian law, 256 F. 2d at 826, here the second cause of action in the proposed amended libel adopted a provision of Liberian law on its face permitting libelant to overtime pay which he claims not to have received. Our ruling as to dismissal will relate solely to this second cause of action and the related claim for penalty wages under 46 U. S. C. § 596.

The district court based the denial of leave to amend in part upon the ground, 175 F. Supp. 3, that "a seaman's claim for compensation which is denied solely from a foreign statute applying to workmen generally is not an 'admiralty or maritime' claim," so that the court was without jurisdiction under 28 U. S. C. § 1333, and no other basis of federal jurisdiction exists. The court was mistaken in ruling that the claim was not maritime. The critical consideration is the claim's relationship to the sea; see *The Pocono*, 276 Fed. 918, 443 (S. D. N. Y. 1921), not whether it arises under unwritten or subject only to the principle of *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917) written law. We have previously sustained seamen's wage claims based solely on foreign statutes, see, e.g., *Bonanza S. S. Atlantic Maritime Co.*, 229 F. 2d 172, 174 (C. A. 2d Cir. 1956); *Pedersen v. Compagnie Des Chargeurs*, 250 F. 2d 582, 584 (C. A. 2d Cir. 1958), affirming 150 F. Supp. 775, 779 (S. D. N. Y. 1957). It is

Opinion of Court of Appeals Reversing District Court Decree

justify the court in declining jurisdiction. However, the hypothesis is an unreal one; for here, in contrast to personal injury claims, there are relevant statutes, and we must determine the issue in the light of them.

The statutes are 46 U. S. C. 596 and 597. Section 596 requires the master or owner of any vessel to pay a seaman on vessels making foreign voyages his wages within twenty-four hours after the cargo has been discharged or four days after the seaman has been discharged, whichever first happens. It further provides that every master or owner who refuses or neglects to make such payment "without sufficient cause" shall pay the seaman a sum equal to two days' pay for each day during which payment is delayed, "which sum shall be recoverable as wages in any claim made before the court." Section 597 provides that "Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or discharge cargo before the voyage is ended, and all stipulations in the contract to the contrary shall be void . . ." And when the voyage is ended every such seaman shall be entitled to the remainder of the wages which shall be due at the time as provided in section 596 of this title." The critical clause is a proviso "That this section shall apply to seamen on foreign vessels while in the ports of the United States and the courts of the United States shall be open for their application."

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Section 597 represents an amendment of Revised Statutes 4530 by § 4 of the Seamen's Act of 1915, 38 Stat. 1165, as further amended by § 31 of the Act of June 5, 1920, 41 Stat. 1066. *Strathearn S.S. Co. v. Dillon*, 252 U.S. 348 (1920), held that § 4 of the Seamen's Act was applicable to foreign seamen despite contrary stipulations in the shipping articles and sustained the constitutionality of the statute as so applied. Although it might have been argued [illegible] the decrees were [illegible] to the [illegible] payment at each port directed by § 597 and not also to the incorporation by reference of the standards of § 596 as to wages and penalty wages, the contrary was determined in *The Southern*, 17 F. 2d 723, 729; 27 F. 2d 1 (C.C.A. 2d), *cert. denied*, 278 U.S. 648 (1931), and the view there taken has been followed in *Glandis v. Collinos*, 130 F. 2d 111 (C.C.A. 9th, 1941); *Lascaris v. United Greek Shipowners Corp.*, 168 F. 2d 681 (2d Cir. 1948); *Rizzamatis v. United Greek Shipowners Corp.*, 179 F. 2d 310 (1st Cir. 1949); *The Flitcroft v. Lewis*, 206 F. 2d 267 (4th Cir.), *cert. denied*, 346 U.S. 867 (1953), and other cases. Admittedly §§ 596 and 597 apply only to "wages." However, we find no persuasiveness in respondent's argument that payments for overtime are not "wages"; they seem to us as fully as much as the war bonuses that were held to be in *Glandis v. Collinos*, *supra*, and in *Lascaris v. Sofianos*, 116 F. 2d 110 (1st Cir. 1940), *cert. denied*, 313 U.S. 597. Likewise, claims for overtime pay under Italian law and for the penalty wages provided in 46 U.S.C. § 596 seem to us within the foreign wages provisions of § 597.

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The question whether the district court may decline to exercise jurisdiction in such a case has provoked a difference of opinion between courts of appeals. In *The Estrella*, 102 F.2d 736 (3d Cir. 1939), *cert. denied*, 308 U.S. 568 (1939), the Third Circuit held it may, Biggs, C.J., dissenting; in *Lakos v. Saliaris*, *supra*, the Fourth Circuit held it may not. We agree with the Fourth Circuit and with the dissenting opinion in the Third.[2]

"If the proviso of 1915 had said only that the section 'shall apply to seamen on foreign vessels while in harbors of the United States,' it could well be contended that the claim thereby created was subject to the usual right of the admiralty to dismiss a suit between foreigners on the ground of inconvenient forum, see *The Belgenland*, 114 U.S. 355, 363 (1885); *Lynch v. Crowder*, 15 Fed. Cas. 1172 (No. 8637) (S.D.N.Y. 1849). However, Congress went further and directed that 'the courts of the United States shall be open to such seamen for its enforcement.' It was unnecessary to add this simply to give the federal courts jurisdiction which they might or might not choose to exercise. For it had been settled from the earliest days that the constitutional and statutory grant of power to them of admiralty and maritime jurisdiction covered seamen's wage claims between foreign seamen and their vessels. [illegible] *Moran v. Baudin*, 17 Fed. Cas. 721 (No. [illegible]) (D. Pa. 1788); [illegible] *Weiberg v. The St. Oloff*, 29 Fed. Cas. 591 (No. 17357) (D. Pa. 1790); *Thompson v. The Catharina*, 23 Fed.

[2] The question [illegible] *The* [illegible] [illegible]

Opinion of the United States District Court Dismissing the Libel and Denying Respondent's Cross Motion for Leave to File an Amended Libel

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Ad. 189-325.

JOHN MONTEIRO,

Libelant,

against

SOCIEDAD MARITIMA SAN MIGUEL, S. A. and the S.S. BUENAVENTURA, her engines, tackle, boilers and appurtenances, etc.,

Respondents.

OPINION

Messrs. Burlingham & Severance, Esqs.,
Proctors for Libelant,
Charles Sullivan, Esq., of Counsel.

Messrs. Haight & Smith, Esqs.,
Proctors for Respondents,
Harold P. Morrison, Esq., of Counsel.

Messrs. [illegible]

In this libel in Portuguese [illegible]

a Liberian flag vessel owned by respondent, a Panamanian corporation. A second cause of action herein seeks recovery under Title 46 U. S. C. A. 596, 597, of a penalty of two days' pay for each day that such pay was wrongfully withheld.

Respondent has filed exceptions to the libel on the grounds that Panamanian law is not applicable to a vessel registered under the laws of Liberia and flying the Liberian flag and that libelant was serving aboard this vessel under articles of agreement of the merchant marine of the Republic of Liberia, and that by reason of the premises the libel fails to state facts sufficient to constitute a cause of action. In support of its position respondent cites a number of cases decided by this court which in effect reaffirm the long settled general rule that the law of the flag of the ship governs the internal economy of the ship, especially with regard to the wages of the crew, and further hold that merely because it is owned by a Panamanian corporation does not make Panamanian law applicable to a ship of foreign registry, particularly where that law is not by its terms so applicable. *Kyrogiannis v. National Hellenic Am. Nav. Co.*, D. C., 162 F. Supp. 520, S. D. N. Y., 1958; *Gonzalez v. Panama Canal Commission*, 150 F. Supp. 705, S. D. N. Y., 1957; *Wiegand v. Compagnie de Navigation*, 141 F. Supp. 166, S. D. N. Y., 1956. We are with respondent and sustain its exceptions.

Libelant's proofs, the opposing of the foregoing position but seeks by presentation here to file an

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Panamanian law which is relied upon and also to set forth a cause of action under the Liberian law in the alternative."

The proposed amended libel sets forth as its first cause of action the identical claim under Panamanian law as to which exceptions were hereinabove sustained, with the exception of the additional allegations in paragraphs sixth, seventh and eighth. These are conclusory allegations based upon information and belief that Panamanian law is applicable to and binds Panamanian corporations operating merchant vessels regardless of where the vessels are operated or the corporation is doing business, and that by incorporating in Panama the corporation agrees to be bound by all the laws of Panama that are applicable. We fail to see where these allegations measure up to what was promised in the cross-moving papers by libelant to "more fully set forth the Panamanian law which is relied upon," and consider them no more than a restatement in effect of the unsupported argument that Panamanian law is applicable to ships of foreign registry. Libelant insists that these conclusory allegations must be deemed admitted for the purpose of testing respondent's "exceptions" thereto and in that light the libel states a good and sufficient cause of action. There is no substance to such argument simply because no exceptions have been made to the proposed amended libel. [illegible] amended libel [illegible] and [illegible] exercise of the court's discretion to which the

Opinion of the United States District Court Dismissing the Libel and Denying Respondent's Cross Motion for Leave to File an Amended Libel

The second cause of action set forth in the alternative in the proposed amended libel in substance is identical to the first except that the claim is based upon Liberian law similar to the Panamanian law relied upon in the first. The third cause of action, as in the original libel, is based upon §§ 596, 597 of Title 46, and depends in necessary part for its success upon libelant succeeding in establishing his claim under one of the other causes of action. These first two primary claims are bottomed, not on any alleged wages due libelant in accordance with the articles he signed and agreed to (for he has signed a statement that he has received all the monies and wages due him from the vessel under these articles), but rather on the provisions of foreign statutes similar to our own minimum wage laws or Fair Labor Standards Acts, and as such are not in their nature of admiralty cognizance. Merely because these foreign statutes are applicable to seamen, as well as to virtually every other calling or type of employee, cannot be said to qualify claims based thereon as maritime claims and thereby within the admiralty jurisdiction of the district court. As a suit by one alien against another based upon a foreign statute, in the absence of diversity of citizenship, it has to rely upon the doctrine of [illegible] [illegible] With regard to the claim based [illegible] [illegible] [illegible] New York [illegible]

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Opinion of the District Court Denying Respondent's Motion for the Libel and Dismissing Petitioner's Cross-Motion for Leave to File an Amended Libel

In accordance with the Court's instructions as provided in the *Cross-Motion Practice for United States of America and The Republic of Liberia*, 14 Statutes-at-Large 1751. It is apparent therefore that the libelant is not without an appropriate remedy and in the absence of any claim of hardship it does not seem necessary in such circumstances to add to the burden of this court's calendar a claim which may properly be pursued under the Liberian law before the Liberian courts. Jurisdiction is accordingly declined.

Accordingly, the exceptions to the libel are sustained and the libel is dismissed without leave to plead over again. The cross-motion to file an amended libel is denied.

These are orders.

[illegible]

Dated, New York, N. Y., August 4, 1950

Relevant Treaty and Statutes

Relevant Treaty and Statutes

time of his discharge on account of wages a sum equal to one-third part of the balance due him. Every master or owner who refuses or neglects to make payment in the manner herein required without sufficient cause shall pay to the seaman a sum equal to two days' pay for each and every day during which payment is delayed beyond the respective periods, which sum shall be recoverable as wages in any claim made before the courts; but this section shall not apply to the case of owners of any vessel the seamen of which are entitled to share in the profits of the cruise or voyage. This section shall not apply to fishing or whaling vessels or yachts.

46 U. S. C. 597

Every seaman on a vessel of the United States shall be entitled to receive on demand from the master of the vessel to which he belongs one-half part of the balance of his wages earned and remaining unpaid at the time when such demand is made at every port where such vessel, after the voyage has been commenced, shall load or unload cargo before the voyage is ended, and all stipulations in the contrary shall be void: Provided, Such a demand shall not be made before the expiration of, nor oftener than once in five days from the time of the vessel's leaving the port where the seaman was last paid off. Any failure on the part of the master to comply with this demand shall release the seaman from his contract and he shall be entitled to full payment of wages earned. And when the voyage is ended every such seaman shall be entitled to be paid the balance of his wages which shall be then due